

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

YADIRA AZUCENA OCAMPO SOTO,)	
Complainant,)	
)	
v.)	OCAHO Case No. 98B00038
)	8 U.S.C. § 1324b Proceeding
TOP INDUSTRIAL, INC.,)	
Respondent.)	Hon. Marvin H. Morse
		Administrative Law Judge

ORDER Of INQUIRY
(February 12, 1998)

I. Procedural and Factual History

By form dated April 8, 1997, Yadira Azucena Ocampo Soto (Soto or Complainant), through her attorney, Daniel T. Streeter, Jr. (Streeter), filed a Charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). Soto alleged that on January 16, 1997, she was escorted from the premises of her employer, Top Industrial, Inc. (Top or Respondent), after she refused to provide proof of her work-authorization status other than that already in Top's file, and that her ejection and Top's demand for proof of her work-authorized status constitute discrimination on the basis of national origin and citizenship status, retaliation, and document abuse.

Soto described Top as a California corporation doing business in Van Nuys, an organization employing less than fifteen (15), but more than five (5) employees. Soto identified herself as an "Otherwise Authorized to Work" alien, Registration No. A072237877, born on September 6, 1969, who has *not* applied for naturalization.

By letter dated August 26, 1997, OSC informed Soto that:

**[T]he Special Counsel has determined that Ms. Ocampo was not
a protected individual under the statute on the date of the
alleged discrimination [January 16, 1997].**

OSC advised Soto that its investigation had ended, and that Soto had the right to file a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety (90) days of receipt of OSC's letter.

By format signed November 3, 1997, Soto on December 24, 1997, *possibly untimely*, filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint claims that Soto was born in Guatemala, is work-authorized, and obtained “work status” on **March 1, 1996**. The Complaint alleges discrimination on the basis of citizenship status, and states that Soto was constructively discharged because of her citizenship status and national origin when she did not provide a “work permit, which they already had in my file.” Soto contends she does not wish to be reemployed, but seeks back pay from January 16, 1997.

OCAHO issued a Notice of Hearing on January 8, 1998.

On February 10, 1998, Top filed its Answer through counsel Michael Alan Gutenplan (Gutenplan). Top’s Answer contains three appendices: 1) a February 10, 1997, letter to Streeter from Gutenplan; 2) a February 26, 1997, letter to Streeter from Gutenplan; and 3) a May 27, 1997, letter to OSC from Gutenplan. The Answer denies all charges and asserts the following affirmative defenses: 1) failure to state a claim upon which relief can be granted; 2) Soto’s own actions -- *i.e.*, immigration document fraud and appropriation of social security numbers of the dead -- were the cause of her purported injury; 3) failure to mitigate damage; 4) estoppel, Soto herself having instigated the injury of which she now complains; 5) duplicate actions, Soto’s Complaint now being echoed in the Los Angeles County Superior Court case, *Ocampo vs. Top Industrial, etc., et al* (Case No. LC043802).

Top contends that:

Ocampo had taken a vacation and was scheduled to return to work on Monday, January 13, 1997. On Friday, January 10, . . . [her] brother Jaime . . . indicated that [she] . . . would not be returning to work as scheduled, because she was having trouble getting back into the country from Guatemala . . . [on] the 14th . . . [she] was at the American Embassy in Guatemala, still trying to get back into the country. . . . Spurred by the telephone calls from Ms. Ocampo’s brother, . . . [Top] felt it appropriate to review Ms. Ocampo’s personnel file, in an attempt to confirm that . . . [she] possesses the proper documentation necessary to legally work in this state.

When Top Industrial’s personnel director reviewed the file, she found a copy of an older Alien Registration Card (“green card”) and numerous social security numbers which . . . [Ocampo] had utilized.

. . . [Ocampo on January 30, 1997] admitted that the [green] card in her Top Industrial personnel file was a forgery.

Answer, Appendix 1, February 10, 1997 Letter, pp. 1, 2.

. . . Top Industrial, Inc. [also] discovered that one or more of the social security numbers belonged to individuals who were no longer living.

Answer, Appendix 3, May 27, 1997 Letter, p. 4, ¶ 2.

According to Top, a month after the allegedly discriminatory incident of January 16, 1997, Soto presented a *photocopy* of an employment authorization card purporting to authorize her employment in the United States from **3/11/96 to 3/10/97**. Answer, Appendix 2, February 26, 1997 Letter, p. 1, ¶ 3; Appendix 3, May 27, 1997 Letter, p. 4, ¶ 4. Alleging the appropriation of multiple social security numbers, and Complainant's admission of forgery, Top did not credit the photocopy.

II. Discussion and Order

Threshold issues must be resolved. Submissions related to these issues should be filed with me no later than **March 13, 1998**.

A. Was Soto's Complaint Timely Filed?

1. Soto shall provide proof of the date on which she *received* OSC's determination letter.
2. Soto shall provide proof that she *filed* her OCAHO Complaint within ninety (90) days of receiving OSC's letter. *See* 8 U.S.C. § 1324b(d)(2).

B. Is Soto a "Protected Individual" Within the Meaning of 8 U.S.C. § 1324b?

1. The OSC determination letter suggests that Soto was not a "protected" individual on **January 16, 1997**, the date of the allegedly discriminatory act.¹ Soto shall

¹*See* 8 U.S.C. § 1324b(a)(1) (stating that unauthorized aliens, as defined in 8 U.S.C. § 1324a(h)(3) may not avail themselves of the statute's protection against discrimination) and § 1324b(a)(3)(B) (excluding from protection "(i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization, or, if later, within six months after November 6, 1986 and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year

advise the basis of her claim that OSC is in error, and provide proof of her contention, as described below.

2. As the party invoking this forum's jurisdiction, Soto shall provide proof that she was a "protected" individual on **January 16, 1997**. She shall, therefore, in chronological order, give:

- a. The date on which she first entered the United States and her immigration and work-authorization status on that date.
- b. The date on which she was first employed by all United States employers, including Top, and her immigration and work-authorization status on those date(s).
- c. All social security numbers used, the dates on which they were used, the reasons for changing social security numbers, and the relationship of the social security number to Soto.
- d. All Work Authorization Permits, Alien Registration Cards, or "green cards" used,

and whether these were
or were not genuine.

- e. All documents used to
establish work-
authorization in the
United States.

Soto shall provide copies of all documents upon which
she relies to support the contention that she is
“protected” by 8 U.S.C. § 1324b.

- 3. Top shall provide a chronology of Soto’s employment,
including date hired, dates of promotion, and the date
on which her position was filled.

SO ORDERED.

Dated and entered this 12th of February, 1998.

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Order of Inquiry were mailed first class, this 12th day of February, 1998 addressed as follows:

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